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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

DEERING MILLIKEN, INC. and DEERING MILLIKEN & CO., INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

NATIONAL LABOR RELATIONS BOARD and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Deering Milliken, Inc.[1] petitions for a writ of certiorari to review the *en banc* decision of the Court of Appeals for the Fourth Circuit entered in this case on May 31, 1968.

OPINIONS BELOW

The opinions of the Court of Appeals (Appendix, pp. 5a-40a[2]) are reported at 397 F. 2d 760. The findings of fact, conclusions of law and order of the Board consist of (a) the Board's 1962 decision and order, reported at 139

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[1]Deering Milliken & Co., Inc., disappeared in 1960 as a result of the merger which created Deering Milliken, Inc., but the Board's order continues to run against the old company, and it is therefore named as a petitioner.

[2]The Appendix to this petition is filed as a separate volume as it relates both to this petition and the companion petition of Darlington Manufacturing Company. Record citations followed by *a* are to the pages of this Appendix.

NLRB 241 (J.A. 1-246[3]), and (b) the Board's supplemental decision, 165 NLRB No. 100 (41a-84a).

JURISDICTION

The decision of the Court of Appeals was rendered May 31, 1968, and a decree of enforcement was entered the same day (1a). On August 29, 1968, the Court of Appeals denied a petition for rehearing (3a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and §§ 10(e) and (f) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether the Board may find a violation of § 8(a)(3) of the National Labor Relations Act, as in the case of a partial closing of a business, where it concludes only that the employer was partly or incidentally motivated by a purpose to discourage future organizational activities in its other plants[4].

2. Whether the requirement laid down by this Court that the closing must also produce a "chilling effect" on other employees is sufficiently met by the Board's finding that the closing had a "reasonable tendency to discourage" future union activities in the other plants.

3. Whether the Board is prevented by the First Amendment and § 8(c) of the Act from using (a) an internal management memorandum, circulated weeks after the clos-

[3] "J.A." refers to the joint appendix before the Court of Appeals on the last appeal.

[4] Darlington's petition for certiorari deals with the question whether the action of the "employer" was sufficiently established by a finding expressly confined to Roger Milliken alone. Petitioner Deering Milliken adopts the Darlington petition in all respects.

ing, to prove the illegal purpose of the closing, and (b) two speeches by the company's president, months before the union campaign had begun, to "clarify and shed light upon" other events.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. §§ 151 *et seq.*, are set forth in the Appendix, p. 85a.

STATEMENT

The essential background facts are set out in Mr. Justice Harlan's opinion for a unanimous Court (Justices Stewart and Goldberg not participating) on the prior appeal. *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U. S. 263, 265-66 (1965). Darlington had for approximately seventy years operated a small cotton textile plant in South Carolina. When the union won a representation election at that plant by a narrow margin in September 1956, Darlington's directors and stockholders voted to dissolve the company and sell its assets, resulting in the charge which is again brought before this Court by the present petition.

The Court's decision was a final disposition of the case if Darlington were regarded as a single unaffiliated company, but not if, as the Board and union claimed, Darlington were but one of a group or complex of corporations, controlled by the Milliken family through the agency of Deering Milliken, Inc. and other corporations. As to the first proposition, the Court said it would be a "startling innovation" (380 U. S. at 270) to hold that a single businessman violates the Act by going out of business, even if motivated by union animus or vindictiveness (pp. 272, 274). But the Court held that if Darlington were in reality a part

of a multi-plant employer, its closing must be regarded as a partial closing of a business, as to which different rules would apply. In that event, the Court said, an unfair labor practice was committed under § 8(a)(3) if the shutdown was "motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect" (p. 275).

Because this case involves "issues of first impression" (p. 277), trenching "closely upon otherwise legitimate employer prerogatives" (p. 276), this Court remanded the case for further Board findings with respect to the "vital requisites" of (a) the chilling purpose of the Darlington closing and (b) its effect upon employees at other plants who might "fear that such [plants] will also be closed down if they persist in organizational activities" (p. 276).

A. The Board's Supplemental Decision

After further exhaustive hearings, the Board's trial examiner held in a lengthy decision (J.A. 1920-2075) that the complaint should be dismissed because neither chilling purpose nor chilling effect had been proved.

Reversing, the Board held that the examiner had misinterpreted the three-part test laid down by this Court (380 U. S. at 275-76), and that in fact and law each requisite to liability had been made out:

Single Employer. The Board reaffirmed its earlier finding that all the companies selling their textile products through Deering Milliken in 1956 constituted a single employer, so as to satisfy the requirement that persons controlling the closed plant have a sufficient "interest" in and "relationship" (p. 276) to other plants to promise a benefit from the discouragement of unionization there (51a-53a).

Chilling Purpose. The Board held, largely because of two speeches by Roger Milliken and an internal memorandum from him to the mills' managements, that this requirement was satisfied by evidence and inferences that he was responsible for the closing, and that "among his purposes" was that of discouraging unionism in other plants (75a-76a). It rejected claims by the companies that it was insufficient to determine his motive alone (68a, 75a), or that the purpose to chill must be found the primary, or at least a substantial, motive for the shutdown (73a).

Chilling Effect. The Board held that it was not necessary to determine whether any chill was felt by employees at other plants, or whether any organizational activities at those mills were in fact discouraged by the Darlington closing. Instead, it was said that this Court only intended it to inquire whether the closing had a natural "tendency to discourage" union adherence elsewhere (82a), and it found that a number of other employees were "in all likelihood" so affected (84a).

The Board left untouched its 1962 order (J.A. 30-33), which *inter alia* required both Darlington and Deering Milliken to make former Darlington employees whole for pay lost in the period from the 1956 closing to the gaining of substantially equivalent employment, and directed Deering Milliken to establish preferential hiring lists at the other mills.

B. The Decision of the Court of Appeals

A divided court, sitting *en banc,* granted enforcement of the Board's order.

The majority, after finding the Board's single-employer findings adequately supported,[5] agreed with the Board's

[5]On the prior appeal, this Court had directed review of the Board's finding that Deering Milliken and the mill corporations, including

conclusion that a purpose to chill unionism in other plants existed. The Court accepted the Board's view that it need only be shown that the employer was motivated "at least in part" by such purpose in shutting the plant (25a), and that motivation could be proved by employer statements showing an antiunion bias (19a-21a).

The Court also held that the requisite chilling effect need not be shown to have actually been felt by other employees, and that it was not necessary to proof of a violation that a union be actively organizing the other plants so long as the employer anticipated that such activity might someday commence.

The Chief Judge concurred, "not without some misgivings" (33a).

The two dissenting judges would have refused enforcement of the Board's order, principally on the ground that the Board had based its findings of chilling purpose and effect largely upon evidence already in the record on the last appeal, and which this Court, by remanding the case for further evidence, must have found insufficient to warrant such findings (37a). The minority also thought that neither the Board nor the majority was entitled to disregard the uncontradicted testimony of the Darlington directors that they gave no thought to the effect of the closing on other mills (38a-40a).

REASONS FOR GRANTING THE WRIT

The right to close an entire business permanently for any reason without violating § 8(a)(3) is now settled as a result of this Court's 1965 decision. But the legality of

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Darlington, constituted a "single employer", judged in accordance with this Court's restatement of the applicable principles (380 U. S. at 277). The Court of Appeals held that the finding was supported by the evidence considered as a whole (14a). No question as to the correctness of this holding is raised by this petition.

any closing that does not extinguish the entire business—a matter this Court obviously thought it had also settled—remains shrouded in uncertainty as a result of the Board's subsequent action.

The permanent discontinuance of part of a business concededly raises "an important [question] in the administration of the Labor Act"[6]. This is also recognized in the widespread comment evoked by the Court's statement of precepts applicable to partial closings[7]. But despite this Court's clear delineation of the kind of proof necessary, a partial closing has here been adjudged to violate § 8(a)(3) on the basis of (1) a purpose to chill not found to be the true motive of the employer, (2) not shown to have had any impact on other employees' union activities, (3) proved against the employer by the use of materials entitled to the protection of the First Amendment and § 8(c) of the Act.

1. This Court was precise in defining what would, and what would not, be acceptable evidence of chilling purpose. It is not enough that a plant "is being closed for antiunion reasons" (p. 275), for a closing, even on the heels of a union election victory, is an "ambiguous" act, not "inherently discriminatory" (p. 269, n. 10). Nor does it suffice to establish only that the closing "necessarily had an adverse impact upon unionization in such other plants"

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[6]Quoted from p. 16 of the Solicitor General's Petition for Certiorari on the prior appeal, October Term 1963, No. 874, where it was also said that the issue involved "a difficult accommodation between" basic management and employee rights (p. 17).

[7]Eighteen articles commenting on the decision are listed at 14 INDEX LEG. PER. 884 (1967). Two of the many leading articles discussing the case are specially relevant to the points here made. In Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices*, 77 YALE L. J. 1269 (1968), the authors remark that the decision "ruled that motive cannot be inferred from effect nor effect from motive; both require objective proof" (p. 1310; see also p. 1327). The same point is made in Getman, *Section 8(a)(3) of the N.L.R.A. and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735, 756 (1965).

(p. 276). The remand ordered by this Court was to allow a search for "motivation which is aimed at achieving the prohibited effect" (p. 276).

The Court was similarly clear in describing the kind of motivation it had in mind. Citing directly to *Darlington,* the Court said in another case decided the same day, *N. L. R. B.* v. *Brown,* 380 U. S. 278, 287, that "the 'real motive' of the employer in an alleged § 8(a)(3) violation is decisive". Similarly, the Court referred to the concurring opinion in the hiring hall case, where it had observed that permissible employer actions are not limited to those having "*no* foreseeable tendency to encourage or discourage union membership or concerted activities"[8].

The Board ignored these warnings, rejecting the contention that its search was for the "true" or "dominant" purpose behind the closing of Darlington (73a).[9] The examiner had read this Court as requiring that the chilling purpose be "a substantial or a triggering purpose without which the action would not have been taken, but not necessarily the dominant purpose" (J.A. 1956). The Court of Appeals seems to have accepted that the illegal purpose must be "the moving cause, a substantial cause, or the immediate cause" of the employer's conduct (24a, n. 26), but it failed to perceive that the Board had expressly refused to find that the purpose to chill was any of these.

In using partial or incidental employer motivation to make an otherwise legal action illegal, the Board and the

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[8] *Local 357, Teamsters* v. *N. L. R. B.,* 365 U. S. 667, 680 (1961), cited at p. 276 of *Darlington.*

[9] It placed its rejection on two grounds: (1) Because this Court used the language, "if motivated by *a* purpose" (p. 275), and "a plant that is being closed for antiunion reasons" (*ibid.*) [but the Board neglected to quote, "act to close their plant with *the* purpose of producing such a result" (p. 275) or "*the* purpose of obtaining some [future] benefit (p. 273)]; (2) Because the Board found warrant for its "at least in part" approach in this Court's incidental use of the phrase at p. 273, n. 19.

Court have added a new dimension to an already confusing picture. Some courts have required in § 8(a)(3) cases, especially those involving partial closings, that the Board find the illegal motive to be the dominant one[10]. Others have accepted as sufficient a Board finding that the motive contributed *substantially* to the result, in the sense that but for the illicit purpose the action would not have been taken[11]. This is the first occasion it has been found sufficient for the Board to find a violation in a partial closing because unlawful motivation contributed only "at least in part" to the result.

As proof of such motivation is one of the "vital requisites" (p. 276) to liability under § 8(a)(3), the inquiry must probe more deeply than the loose test the Board has set for itself, as shown by the two other leading cases decided the same day as *Darlington*. The employer actions upheld in *N.L.R.B.* v. *Brown*, 380 U. S. 278, and *American Ship Building Co.* v. *N.L.R.B.*, *id.* 300, were motivated "at least in part" by a desire to discourage unionism; in both cases the employer was absolved on the basis of his "true" or "dominant" motivation. But the Board was faced with

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[10] *E. g.*, *N. L. R. B.* v. *Neiderman*, 334 F. 2d 601, 604 (2d Cir. 1964); *N. L. R. B.* v. *Jones Sausage Co.*, 257 F. 2d 878, 881-82 (4th Cir. 1958); *N. L. R. B.* v. *Kingsford*, 313 F. 2d 826, 831 (6th Cir. 1963) [but see *N. L. R. P.* v. *Ogle Protection Serv., Inc.*, 375 F. 497, 505 (6th Cir.), *cert. denied*, 389 U. S. 843 (1967)]; *Nachman Corp.* v. *N. L. R. B.*, 337 F. 2d 421 423 (7th Cir. 1964); *Marshfield Steel Co.* v. *N. L. R. B.*, 324 F. 2d 333, 337 (8th Cir. 1963).

[11] *N. L. R. B.* v. *Billen Shoe Co.*, 397 F. 2d 801, 803 (1st Cir. 1968); *N. L. R. B.* v. *Houston Chronicle Pub. Co.*, 211 F. 2d 848, 850-51 (5th Cir. 1954); *N. L. R. B.* v. *Atlanta Coca-Cola Bottling Co.*, 293 F. 2d 300, 309 (5th Cir. 1961); Accord: *Rust Sales Co.*, 157 NLRB 1681, 1688 (1966) ("dominant motive"); *Tonkin Corp. of California*, 165 NLRB No. 61, 65 LRRM 1521, 1523 (1967) ("in substantial part" antiunion); *Mid-West Towel & Linen Service, Inc.*, 143 NLRB 744, 754 (1963), *enf'd*, 339 F. 2d 958, 962 (7th Cir. 1964) ("the predominating or motivating reasons").

conceptual difficulties if it used either of these tests here[12], and it simply ignored the inconsistency.

It is not mere semantics to require that the illegal purpose be a significant element in the totality of motivations leading to the challenged action. If *any* illegal motivation will taint the resulting action, then this Court's decision, which was intended to settle the rules applicable to partial closings, may well result in challenge to a whole new group of employer actions under § 8(a)(3).[13]

2. The second requirement, that there must also have been a chilling effect on employees in other Deering Milliken plants, was likewise precisely defined (p. 276):

> "It does not suffice to establish the unfair labor practice charged here to argue that the Darlington closing necessarily had an adverse impact upon unionization in such other plants."

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[12]The Board had held in 1962 that Darlington was closed to punish the employees for exercising their rights to self-organization. In 1965 this Court held this was a lawful purpose. This posed a dilemma for the Board on remand: how could it now find the true purpose was to chill? Contrary to the Court of Appeals (24a), we did not claim a basic incompatibility between these two motives, but only that the earlier finding explained why the Board later felt it necessary to adopt its strained "at least in part" formulation.

[13]We do not suggest that either the Board or the Court would demand absolute purity of motive before exculpating the employer, or that liability can be found under this Court's decision only by showing that the chilling purpose was so dominant as to be a virtual obsession. Between these polar positions, however, lies what common sense tells us will be the great majority of actual cases. It will be the rare employer who can prove that he gave no contemplation whatever to whether the closing of part of his business would deter union organization of the rest. As the Chief Judge observed (33a), it would be "managerial imprudence" for this factor to be ignored.

Nor, said the Court (p. 269), is this a situation where the employer "must be held to intend the very consequences which foreseeably and inescapably flow from his actions"[14].

Despite these clear statements, the Board dealt with this issue as follows (82a):

> "[W]e assume that the Court intends us to apply the usual standard of whether the closing had a natural 'tendency to discourage' union adherence in other plants [citing *Radio Officers*]."

But when this Court had spoken of reasonably foreseeable effect (p. 275), it did so in terms of employer motivation, and the context showed that it intended the Board to go beyond finding a mere expectation that the Darlington example might someday discourage employee attempts at self-organization in other mills.[15]

Despite tremendous effort on the part of the Board's General Counsel to prove an *in terrorem* effect from the Darlington closing at the other mills, the Board conceded that very little evidence of this kind was adduced (81a). But this gap in the record did not authorize it to resort to a *Radio Officers* test, if only because the absence of any evidence of actual effect tends to rebut any inference sought to be drawn as to the effect that was foreseeable. *Cf. Modern*

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[14]Citing *N. L. R. B.* v. *Erie Resistor Corp.*, 373 U. S. 221, 228 (1962), followed by "See *Radio Officers* v. *Labor Board*, 347 U. S. 17, 42-43".

[15]Thus, the Court spoke of the foreseeability that other employees might fear that their plants would also be closed down "if they persist in organizational activities". Neither the Board nor the Court below would read into this phrase any more than the broad meaning of "engage in protected activities", as in § 7 of the Act, the Court rejecting anything else as "a fine distinction" (26a). But it seems clear that this Court chose its language with some care, recognizing that the more usual term could be misinterpreted. *Any* partial closing of an unorganized business will inevitably generate some employee apprehension about the consequences of "engaging" in union activities.

Plastics Corp. v. *N. L. R. B.*, 379 F. 2d 201, 204 (6th Cir. 1967); *United States* v. *American Optical Co.*, 39 F. R. D. 580, 585 (N. D. Calif. 1966).

Nor do the § 8(a)(1) cases cited by the Board (82a) and the Court of Appeals (29a, n. 33) relieve the Board from following this Court's precept. Such cases are irrelevant in considering a § 8(a)(3) charge, under which "due protection is to be accorded the employer's right to manage his enterprise [citing *Darlington*] * * * even though the act committed may tend to discourage union membership." *American Ship Building Co.* v. *N. L. R. B.*, 380 U. S. 300, 311 (1965).

In announcing a virtual *per se* rule affirming that any plant closing will discourage union adherence of employees at other plants the Board has misconstrued the precepts announced by this Court when this case was last before it. The error is of such fundamental gravity that it can only be corrected by further action of this Court.

3. Section 8(c) (quoted in full at 85a) provides that "The expressing of any views, argument, or opinion" shall neither be, nor be evidence of, an unfair labor practice "if such expression contains no threat of reprisal or force or promise of benefit". It is conceded that the employer statements used to fix liability here do not fall within the quoted exception (J.A. 1981-82, 2018, 2022). All were used on the basis of two other exceptions read into the statute: (1) employer statements which are "instructions" or "directions" are not protected by § 8(c), and (2) the section does not bar the use of employer statements as "proof" or, alternatively, as "background evidence" that other acts are violative. The validity of these two exceptions has not been directly passed upon by this Court, and we submit should be.

A. The exclusion as to "instructions or directions" was used by the Board and the Court to permit the receipt in

evidence of a single document, used to carry almost the entire weight of the Board's findings as to chilling purpose and effect. Two months after the decision of the directors to close Darlington, Roger Milliken circulated to the managers of the other mills a memorandum (and attachments) relating to the Darlington closing. These have been repeatedly cited by the Board[16] and have now become the *exclusive* evidentiary basis for a necessary ingredient of the Board's case, employer anticipation of union activity.

Both the Board and the Court of Appeals agreed that § 8(c) did not prohibit the use of the memorandum, but for different reasons. The Board, describing it as "a recommendation [to the mills] for a 'public relations' program" (66a), held that § 8(c) permitted the use of "employer statements of opposition to unions" where the employer's motivation was in issue (59a, n. 8). The Court viewed it in a different light: "The memorandum was a directive to the mill treasurers and other officials to review their public relations" (19a). It thus found it unprotected by § 8(c) because of Senator Taft's remarks that the section was not intended to "cover instructions, directions, or other statements which might be deemed admissions under ordinary rules of evidence" (19a).

The legislative history of the Act emphasizes the constitutional privilege of free speech inherent in § 8(c).[17] Even the Board, in the years immediately following enactment of the section, accepted the limitation placed upon its powers.[18]

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[16]The Board quoted extensively from the memorandum and its attachments in both its 1962 and 1967 decisions, and in his petition for certiorari on the last appeal (*supra* n. 6) the Solicitor General argued (p. 14) that it "accurately reflected * * * [the] avowed purpose" of the Darlington closing.

[17]Section 8(c) was passed because Congress believed the Board had unduly restricted an employer's right to speak freely on labor matters. Cox, *The Labor Management Relations Act*, 61 HARV. L.

The commentators were in agreement[19], and other Courts of Appeals have continued to regard it as "well settled" that a "narrow or strained construction" of the free speech provision is to be avoided. *E.g., N.L.R.B.* v. *Arkansas Grain Corp.,* 392 F. 2d 161, 163-64 (8th Cir. 1968).

The alternative exclusion, which would remove "instructions or directions" from the scope of § 8(c), is valid in theory, but cannot be applied here without distorting the purpose of the statute. Even the Board would not regard the memorandum as a directive (supra, p. 13). To deny the right to communicate freely with other executives without fear that the words will later be used by the Board as admissions, because they are "directive" in nature, introduces

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REV. 1, 15 (1947); see also Pokempner, *Employer Free Speech under the N.L.R.A.*, 25 MD. L. REV. 111, 112-15 (1965). The Senate bill had provided (1 LEGIS. HIST. OF L.M.R.A. 114) that a finding of unfair labor practice could not be "based" upon a protected statement, but the House version (*id.* 56), later adopted, prevented the Board from using a non-coercive statement even as "evidence" of a violation, because, as Senator Taft later explained, otherwise the employer "cannot afford to speak at all * * * there is [no] freedom of speech" 2 *id.* 1546.

That the Board may not consider non-coercive employer expressions as evidence because it decides that the employer's motivation or intention is at issue, see *id.* at 1555, 1567, 1580, 1591, and the President's veto message (1 *id.* 918).

[18]The Board held it could not rely upon non-coercive speeches "in evaluating the employer's motivation and conduct", *Carpenter Steel Co.,* 76 NLRB 670, 671 (1948), because § 8(c) provided that a finding that other employer actions were unfair labor practices could "in no degree" be based upon protected statements. *Pacific Moulded Prods.,* 76 NLRB 1140, n. 2 (1948); see also *Consumers Cooperative Refinery Ass'n,* 77 NLRB 528, 530 (1948), *aff'd per curiam,* 180 F. 2d 581 (5th Cir. 1950).

[19]Cox, *op. cit.* n. 17, p. 19; Wyle, *Union Organization Activity under Taft-Hartley,* 11th N.Y.U. CONF. ON LAB. 191, 202 (1958); Wyle & Englander, *"Free Speech" or Lawful Coercion,* 5 LAB. L.J. 270, 272-73 (1954). Mr. Wyle has been counsel of record for the union in this case.

mischievous possibilities into the law[20]. Senator Taft's explanation (quoted by the Court at 20a) that the intended reference was only to "statements which are acts in themselves or contain directions or instructions" emphasizes the incongruity of applying this rule to a management memo, not aimed at (or ever seen by) an employee audience.

Commentators have recognized that Senator Taft's explanation shows only an intent to preserve a narrow exception covering what the common law termed "verbal acts"[21]. Even the Board originally limited the exclusion to situations where the employer's words and conduct were "so intertwined as to be considered a single coercive act". N.L.R.B. ANN. REPT. (1948) 49. Such were the facts in the one instance where this Court found the statement on a picket's sign unprotected because directive in nature. *N.L.R.B.* v. *Denver Bldg. & Constr. Trades Council,* 341 U. S. 675, 690-91 (1951); But see *N.L.R.B.* v. *Exchange Parts Co.,* 375 U. S. 405, 409n (1964); *N. L. R. B.* v. *Golub Corp.,* 338 F. 2d 921, 927 (2d Cir. 1967).

B. Two speeches by Roger Milliken, long before the union appeared at Darlington, one to a group of state officials and the other to a local businessmen's club, were used by the Board as "direct communications of Roger Milliken's intention to thwart unionism wherever it appeared" (63a), although the Board ostensibly cited them only as evi-

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[20]For example, it may now be argued that the Board or a union is free to subpoena employer files dealing with the history or background of a labor dispute, or require the participants in management caucuses to report what was said, because there may be evidence of an instruction or direction which will render § 8(c) inapplicable.

[21]Drotning, *Employer Free Speech: Two Basic Questions Considered by the NLRB and the Courts,* 16 LAB. L. J. 131, 136-37 (1965), and Burke, *Employer Free Speech,* 26 FORD. L. REV. 266, 276, 291 (1957).

dence of his fears and beliefs (59a). The Court apparently with some misgivings[22], approved such use to show "background" and to "place other non-verbal acts in proper perspective" (21a), thereby disagreeing with several other Courts of Appeals, which have held the statute means what it says[23]. This becomes merely a device to evade the prohibition of § 8(c) against the use of statements as "evidence". It is anomalous to receive evidence barred as direct proof of guilt to prove a predisposition to commit the offense charged.

The time has come to call a halt to the gradual erosion of § 8(c), and the even more basic constitutional rights involved, by fine-spun distinctions of "background" information and "recommendations" that are transmuted into illegal directions. There is a clear need for this Court to give the same delineation of § 8(c) rights that it gave to other basic employer rights on the first appeal.

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[22]The Court conceded that the speeches stood "on a different footing" from the memorandum (20a), but added that, even if they were considered to be barred by § 8(c), they "revealed nothing of substance not shown by other evidence" (21a). But the Court did not specify what other evidence it had in mind, and it remains clear that there was no evidence whatever, other than materials covered by § 8(c), of the employer's anticipation of a union organizational drive.

[23]*Coppus Eng'r Corp.* v. *N.L.R.B.*, 240 F. 2d 564, 570-71 (1st Cir. 1957); *Trailmobile Div., Pullman, Inc.* v. *N.L.R.B.*, 389 F. 2d 195, 196 (5th Cir. 1968); *N.L.R.B.* v. *Mt. Vernon Tel. Corp.*, 352 F. 2d 977, 979 (6th Cir. 1965); *Indiana Metal Prods. Corp.* v. *N.L.R.B.*, 202 F. 2d 613, 617 (7th Cir. 1953); *Gem Int'l, Inc.* v. *N.L.R.B.*, 321 F. 2d 626, 629 (8th Cir. 1963). A different rule may pertain in § 8(a)(1) cases, two of which were relied on by the Court below (21a, n. 24). But see *N.L.R.B.* v. *Rockwell Mfg. Co.*, 271 F. 2d 109, 118 (3d Cir. 1959).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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